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Description of document: Equal Employment Opportunity Commission (EEOC)
Office of Federal Operations (OFO) Quarterly Report
Strategic Enforcement Plan/Federal Sector Complement
Plan (SEP/FCP), 2015

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September 16, 2019

Re: FOIA No.: 820-2019-000390 (Quarterly Reports)

Your Freedom of Information Act (FOIA) request, received on April 29, 2019, is processed. Our search began on April 29, 2019. All agency records in creation as of April 29, 2019 are within the scope of EEOC's search for responsive records. The paragraph(s) checked below apply.

[X] Your request is granted in part and denied in part. Portions not released are withheld pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.

[X] You may contact the EEOC FOIA Public Liaison, Stephanie D. Garner, for further assistance or to discuss any aspect of your request. In addition, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer.

The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at (202) 741-5770; toll free 1-877-684-6448; or facsimile at (202)741-5769.

The contact information for the FOIA Public Liaison: (see contact information in the above letterhead or under signature line).

[X] If you are not satisfied with the response to this request, you may administratively appeal in writing. Your appeal must be postmarked or electronically transmitted in 90 days from receipt of this letter to the Office of Legal Counsel, FOIA Programs, Equal Employment Opportunity Commission, 131 M Street, NE, 5NW02E, Washington, D.C. 20507, or by fax to (202) 653-6056, or by email to FOIA@eeoc.gov, or online at the following public access link (PAL): <https://publicportalfoiapal.eeoc.gov/palMain.aspx>. Your appeal will be governed by 29 C.F.R. § 1610.11.

[X] See the attached Comments page for further information.

Sincerely,

/s/Sdgarner

Stephanie D. Garner
Assistant Legal Counsel
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Applicable Sections of the Freedom of Information Act, 5 U.S.C. § 552(b):

Exemption(s) Used: (b)(7)(C)

Exemption (b)(7)(C) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, authorizes the Commission to withhold:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy

The seventh exemption applies to civil and criminal investigations conducted by regulatory agencies. *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998). Release of statements and identities of witnesses and subjects of an investigation creates the potential for witness intimidation that could deter their cooperation. *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 239 (1978); *Manna v. United States Dep't. of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). Disclosure of identities of employee-witnesses could cause "problems at their jobs and with their livelihoods." *L&C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984).

The Supreme Court has explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA and noted that "disclosure of information about private citizens that is accumulated in various governmental files" would "reveal little or nothing about an agency's own conduct." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

For the purposes of determining what constitutes an unwarranted invasion of personal privacy under exemption (b)(7)(C), the term "personal privacy" only encompasses individuals, and does not extend to the privacy interests of corporations. *FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1178 (2011).

DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(7)(C):

OFO Quarterly SEP/FCP report – Complainant Names redacted

Comments

This is in response to your Freedom of Information Act (FOIA) request. You request a copy of the OFO Quarterly SEP/FCP reports and the OFO Quarterly Digest posted on EEOC Office of Federal Operations (OFO) internal website. Your request is granted in part and denied in part.

OFO Quarterly SEP/FCP reports (21 pages) is granted in part and denied in part. The complainant names were withheld under exemption (b)(7)(C) to the FOIA to protect the personal privacy of the federal complainants.

EEOC OFO Quarterly Digest is available on our public website. The link from our internal website hyperlinks to our external website. Refer to the link below.

<https://www.eeoc.gov/federal/digest/index.cfm>

For a full description of the exemption codes used please find them at the following URL:
<https://publicportalfoiapal.eeoc.gov/palMain.aspx>

This response was prepared by Tracy L. Smalls, Government Information Specialist, who may be reached at 202-663-4331.

**Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
1st Quarter FY 2015**

I. Background: General FY 2015 1st Quarter Appellate Review Program Accomplishments

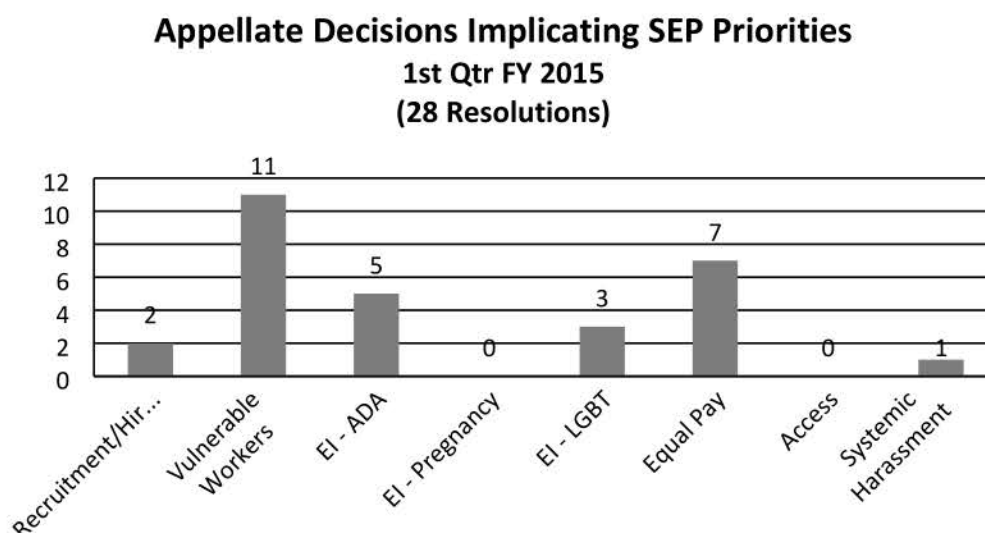
During the 1st Quarter FY 2015, the Office of Federal Operations (OFO) resolved 948 appeals. These resolutions included 339 decisions on the merits and 499 procedural closures. Of the 499 procedural closures, 354 of them involved initial appeals under review by OFO, and we reversed 152 or 42.9% of the agency dismissals. With regard to the merit decisions, OFO issued 10 findings of discrimination during the 1st Quarter. We found discrimination on the basis of retaliation in 6 of the findings, disability in 3 of the findings, sex in 2 of the findings, and race in 2 of the findings. The top three issues involved in the findings included harassment (4), disability accommodation (2), and discipline (2).

Resolution Description	1st Quarter	Year to Date
Resolutions	948	948
Merits Resolutions	339	339
Findings	10	10
Non-Findings	329	329
Procedural Resolutions (all)	499	499
Procedural Resolutions (from Initial Appeal)	354	354
Affirming Dismissal	198	198
Remanding Dismissal	152	152

With regard to the categorization of the 948 resolutions, OFO identified 28 appeals that implicated one or more SEP/FCP priority.¹ Section II below contains charts breaking down the composition of the individual priorities, summaries of the 28 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 1st quarter.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 29 SEP categories identified in the 28 appellate decisions OFO identified as implicating an SEP/FCP category:

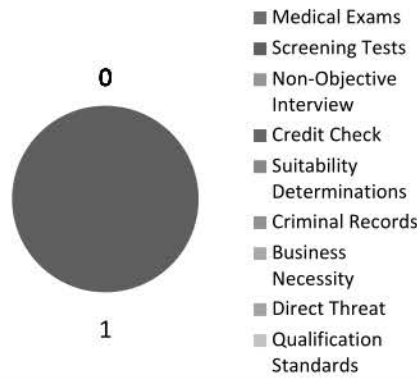


¹ One appellate decision was categorized as implicating two separate SEP priorities, and this is noted in the summaries below.

The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the 10 findings of discrimination issued during the 1st Quarter that did not implicate an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

**SEP - Recruitment & Hiring (FCP Categories)
2 Decisions* - 1st Quarter**



* Of the two (2) decisions implicating this SEP priority, only one (1) implicated an FCP priority – Screening Tests.

(b)(7)(C) v. FDIC, 0520140310 (10/31/2014) – Complainant, an applicant for a position as a Financial Institution Specialist with the Corporate Employee Program (CEP), in Arlington, Virginia filed a class complaint alleging that the Agency’s CEP, which is used to recruit and hire individuals for the Agency’s entry level Financial Institution Specialist positions “is age-biased in recruitment and hiring of 40+ year old candidates.”

An EEOC AJ denied class certification. Specifically, the AJ found that Complainant failed to provide evidence of a discriminatory policy; failed to identify who would potentially be members of the class; and failed to identify what portion of the CEP, which was a multi-phase and multi-tiered program, was discriminatory. The AJ held that Complainant did not establish commonality, typicality, numerosity, and adequacy of representation. On appeal, the Commission affirmed the AJ’s denial of class certification, concurring with the reasons set forth in the AJ’s decision.

Complainant requested reconsideration of the appellate decision. In his request, Complainant submitted additional data regarding the Agency’s recruitment under the CEP based on his attendance at two separate recruiting events in order to support his allegations of discrimination based on age. In addition to submitting this data, Complainant also attempted to “more accurately” describe and define the class grievance in order to fulfill the typicality and commonality requirement of class certification. Complainant reiterated his contention that he would be unable to meet the numerosity and adequacy of representation requirements because: (1) the Agency refused to provide him with the names and addresses of all CEP candidates who were invited to interview from the program’s inception to the date of the request; and (2) in order to retain as counsel a “well established law firm,” he would need to make a \$20,000 down payment, which he did not have.

The Commission denied the Request on the grounds that it failed to meet the criteria warranting reconsideration of the decision made in the previous appeal.

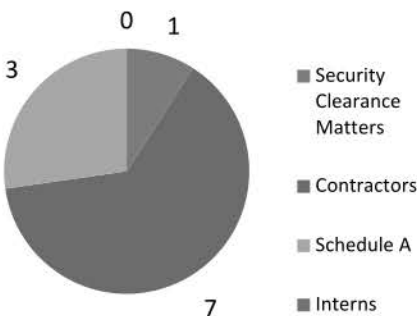
(b)(7)(C)

v. DHS, 0120140736 (11/19/2014) – Complainant was an applicant for employment as a Transportation Security Officer (TSO) at Billings Logan International Airport in Montana. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Not Specified), national origin (Not Specified), sex (male), color (Not Specified), disability (diabetes), age (52), genetic information (Not Specified), sexual orientation (Not Specified), and in reprisal for prior protected EEO activity when he was not selected for the TSO position. At the conclusion of the investigation and after Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision concluding that Complainant’s diabetes rendered him unqualified for the TSO position. On appeal, Complainant argues that he is qualified for the position because his primary care physician has determined that his diabetes is “under excellent control.” However, OFO agreed with the Agency that “the presence or absence of specific medical conditions” governs the question of a TSO applicant’s medical qualification. The ability of the applicant to perform the functions of the position does not factor into the qualification determination. In this case, Complainant had displayed symptoms of diabetic neuropathy and, therefore, failed to meet the Agency’s “Medical Guidelines for Transportation Security Officers” issued pursuant to the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 40101 et seq. In reaching this conclusion, OFO relied on the Commission’s decision in Complainant v. Dep’t of Homeland Security, EEOC Appeal No. 0720100037 (3/26/2014) (complainant not qualified for TSO position because he could not meet an ATSA-mandated standard). Because Complainant was not qualified for the TSO position, he failed to establish a prima facie case of discrimination on any of the alleged bases.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 1st Quarter of FY 2015 OFO resolved 11 decisions under this SEP Priority and its associated FCP priorities.

**SEP - Vulnerable Workers
(FCP Categories)
11 Decisions - 1st Quarter**



Decision Summaries for this Category

(b)(7)(C)

v. DHS, 0120120861 (10/10/2014) – Complainant, a Protective Service Officer placed at a federal building by a Contractor, alleged race, sex, and age discrimination. The Agency accepted and investigated his complaint, after which Complainant requested a hearing. The Agency moved for summary judgment, arguing that Complainant was a contractor, not an employee, and that Complainant had not shown a causal connection between the alleged discrimination and his protected groups, nor that the incidents cited rose to the level of harassment. The AJ dismissed the complaint for failure to state a claim, and remanded the case to the Agency. The Agency, after noting that it could dismiss the complaint, addressed the complaint on the merits, finding no discrimination.

On appeal, OFO affirmed. After finding no genuine issue of material fact, OFO noted that the Contractor set Complainant's hours of work, paid his salary, withheld taxes, provided health benefits and annual leave, and provided him with a firearm, uniform clothing, and personal gear, and that his first- and second-level supervisors were employees of the Contractor. OFO also noted that Complainant performed work in a federal building, the work did not require a high level of skill or expertise, the Agency provided the x-ray machine and other equipment that he used on the job, his work was an integral part of the Agency's mission to provide a safe environment in federal buildings, the Agency exercised such control over his job performance that a Federal Protective Service Officer (FPSO) monitored his performance and required him to undergo one-on-one training, and he was removed from his post upon FPSO's recommendation. Citing both the Ma factors and the EEOC guidance on contingent workers, OFO found that the Agency exercised sufficient control over Complainant's work to be considered a joint-employer for purposes of processing the EEO complaint. Addressing the merits of the complaint, OFO found no discrimination.

(b)(7)(C) **v. State**, 0120131112 (10/17/2014) – Complainant worked as a Language Instructor at the School of Language Studies in the Agency's Foreign Service Institute, located in Arlington, Virginia. Believing that he was subjected to discrimination based on age and religion, Complainant filed an EEO complaint. Specifically, he alleged he was discriminated against when: (1) his contract was not renewed, without reason and (2) on two occasions he was not selected for Direct Hire positions when he had a rating of 100.

The Agency dismissed the complaint on the grounds that Complainant was not an employee, but rather a contractor employed by Global Language Translation (GLT). The Agency reasoned that Complainant's contract with GLT states he is an "at-will" employee of GLT, and the only benefits (provided by GLT) are unemployment compensation and workers' compensation.

OFO noted that while the Agency listed the Ma factors in its decision, it did not provide adequate analysis of those factors. The only document resembling a contract was an August 2011 letter from GLT to Complainant, offering him the position. After reviewing the letter, the Commission concluded that factors (8), (9), (10), and (11) indicated he was not an employee. However, factors (2), (4), (6), and (7) indicated that Complainant is an Agency employee. Therefore, the Commission concluded that the Agency exerted sufficient control to be considered a joint employer with respect to Complainant's termination claim (i.e. the decision to not renew his contract). As to the non-selection claim, the Ma analysis is inapplicable, as Complainant was an applicant of the Agency and therefore covered by the EEO process.

(b)(7)(C) **v. DOT (FAA)**, 0120141746 (11/25/2014) – Complainant worked for private staffing firm serving the Agency as the Captain over the firm's security guards at an Air Route Traffic Control Center. He filed a complaint regarding being terminated. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. On appeal, OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as his joint employer. Specifically, the contract with the staffing firm which the Agency had a large role in negotiating required the Captain to be on duty during specified times, to meet numerous qualification requirements and perform numerous specified functions including wearing uniforms, carrying a certain type of gun and ammunition, facility training, and complying with general, special and temporary facility specific orders developed and maintained by the Agency. Complainant served the Agency for 10 years. Because this was a termination case, an especially significant control factor was whether the Agency had tantamount power to terminate Complainant. The record showed the Agency cancelled its entire contract with the staffing firm partly based on Complainant's actions or leadership, resulting in his termination. This demonstrated tantamount removal authority.

(b)(7)(C) **v. VA**, 0120141772 (11/21/2014) – Complainant claimed discrimination based on race, national origin, disability and age when he was not referred for consideration for a Cemetery Caretaker position. The matter was investigated and Complainant requested a decision without a hearing. Thereafter the Agency issued its decision finding no discrimination. Complainant appealed. The HR employee who failed to refer Complainant's application admitted she misread Complainant's resume because he put his most recent experience on the

second page instead of at the top of page one and so she initially rejected his application thinking he had no relevant experience at all. When Complainant asked her to look again she realized her mistake but by then the selection had already been made. Despite the error, Complainant could not show discrimination. Complainant and the Selectee both applied under Schedule A authority, but Complainant's qualifications were not as impressive as those of the Selectee. Complainant was not able to show the Agency's articulated reason for not selecting him was a pretext.

(b)(7)(C) **v. DOJ**, 0120142204 (11/21/2014) – Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination based on her disability when she was not selected for a variety of positions from February 10, 2010 to June 22, 2010. The Agency issued a decision finding no discrimination.

OFO assumed for purposes of analysis that Complainant was an individual with a disability. OFO found determined that the Agency provided legitimate, nondiscriminatory reasons finding Complainant not eligible for some of the position for which she applied. As to the positions for which she was qualified, the Agency indicated that she was not referred for consideration because she was not rated high enough make the cut-off. To the extent Complainant asserted that she should have been placed in one of these positions pursuant to Schedule A consideration, OFO noted that federal agencies are authorized to use Schedule A hiring authority when considering people with disabilities, but the use of this authority is not mandatory. OFO concluded that Complainant did not establish that the Agency's actions constituted discrimination.

(b)(7)(C) **v. DOE**, 0520140215 (11/7/2014) – Complainant was placed by a private contractor to work with the Agency as a Program Manager at its cyber division. Complainant subsequently filed an EEO complaint, alleging that the Agency discriminated against him and subjected him to harassment based on race. Therein, Complainant alleged that he was given an unfavorable report, his growth was hindered, and the Agency influenced the private contractor to lay him off. The Agency thereafter dismissed Complainant's complaint for failure to state a claim, finding that Complainant was a government contractor and not an Agency employee. In reversing the Agency's dismissal, we found that based on "Ma Factors" 1, 3-6, 9 and 11, the Agency exercised sufficient control over Complainant's position to qualify as his employer for the purposes of the EEO complaint process. The Agency requested reconsideration, asserting that our previous decision erred in finding that it exercised sufficient control over Complainant. In denying the Agency's request, we noted, inter alia, that Complainant used Agency equipment and worked in an Agency office, which weighed in favor of Complainant being a federal employee.

(b)(7)(C) **v. VA**, 0120131609 (12/16/2014) – Complainant filed a complaint alleging that she was discriminated against based on her disability when she was not hired. She also contended that because of her Schedule A status, she should have been hired. Schedule A is an excepted service hiring authority federal agencies can use to hire and promote individuals with disabilities. Following an investigation, Complainant requested a hearing, but subsequently withdrew her request. The Agency found no discrimination. The EEOC affirmed. It found that Complainant did not show that the Agency's explanation for not hiring her, that it believed the selectees were better qualified, was pretext to mask discrimination. Citing various authorities, it also found that while federal agencies are authorized to use Schedule A hiring authority when considering people with disabilities, the use of this authority is not mandatory.

(b)(7)(C) **v. CIA**, 0120142273 (12/04/2014) – Complainant worked for private staffing firm serving the Agency as Security Officer. She filed a complaint alleging discrimination when she was harassed and terminated. The Agency dismissed the complaint for failure to state a claim, finding that Complainant was not an employee of the Agency. On appeal, OFO affirmed because the Agency did not exercise sufficient control over Complainant's position to qualify as her joint employer. Specifically, her staffing firm provided post orders for the duties to be assigned, which the Agency reviewed annually. The staffing firm provided supervisors, and Complainant generally worked without supervision. Complainant's job was to provide security for staff, not the Agency's mission. The staffing firm provided Complainant's compensation and benefits. Complainant was

terminated by the staffing firm because after her security clearance was revoked by the Agency it could no longer provide her work. Inasmuch as the Agency and staffing firm required a security clearance, this showed they both shared control over Complainant's job loss. The decision noted that Complainant's claim regarding this matter focused on the loss of her security clearance, and the Commission did not have authority to review the Agency's determination with regard to the substance of the security clearance decision.

(b)(7)(C) **v. Army**, 0120142416 (12/02/2014) – Complainant worked for private staffing firm serving the Agency as a Soldier & Family Assistance Counselor. She filed a complaint alleging discrimination when she was harassed, was not selected for promotion to a supervisory contract position, was demoted from her contract team lead assignment, and her duties as contract acting supervisor were removed. The Agency dismissed the complaint for failure to state a claim, finding that Complainant was not an employee of the Agency. On appeal, OFO affirmed because the Agency did not exercise sufficient control over Complainant's position to qualify as her joint employer. Specifically, her staffing firm had an active on-site supervisor who gave Complainant her daily assignments, was involved in operations at the worksite, and drafted her appraisal. Complainant submitted her leave requests to the staffing firm, which acted on them. While Complainant indicated that an Agency official told her not to come to weekly synchronization meetings, she did not listen to him and came to the next one, and the record showed she continued to attend. Contrary to Complainant's contentions, the weight of the record showed that the Agency did not have de facto control over who the contracting firm assigned as the supervisor, team leader, or acting supervisor. Also, the staffing firm was responsible for and administered all of Complainant's compensation.

(b)(7)(C) **v. Dep't of the Army**, 0520140387, 0520140388 (12/03/2014) – Complainant was a contractor employed with CACI Technologies, Inc., serving as a Senior Electrical Engineer at Night Vision and Electronic Sensors Directorate (NVESD) in Fort Belvoir, Virginia at the time of the events giving rise to the underlying complaints. On December 29, 2011, Complainant filed a formal complaint alleging that she was discriminated against her based on her national origin (Hispanic), sex (female), disability, age, and reprisal for prior protected EEO activity when in October 2011, she was informed by NVESD that her position was being terminated. On January 10, 2012, Complainant filed another formal complaint which the Agency defined as alleging that it discriminated against her based on the above bases when the Chief of the Optics and Photonics Integration Branch of the U.S. Army Research Laboratory (ARL) withheld funding for her projects, and due to the lack of funding she was terminated in October 2011.

In a Final Decision, the Agency separately dismissed the complaints for failing to state a claim on the grounds that Complainant was not an employee of the Agency. On appeal, among other things, Complainant argued that she was an employee of the Agency. In an appellate decision issued May 20, 2014, the Office of Federal Operations found that Complainant was jointly employed by the Agency and U.S. Army Research Laboratory (ARL), and was entitled to participate in the federal sector EEO process.

The Agency requested reconsideration of the May 2014 appellate decision. In its request, the Agency argued that the appellate decision stretches the standards articulated in the Ma test "as to make virtually every support contractor in every government Agency a de facto employee." Additionally, the Agency contends that employing this "de facto government employee status to all embedded government support contractors" would have a substantial impact on the policies, practices or operations of the Agency.

The Commission denied the Agency's Request on the grounds that it failed to meet the criteria warranting reconsideration of the appellate decision.

(b)(7)(C) **v. State**, 0520140414 (12/11/2014) – **[Repeated under Priority 6 below]** – Complainant was a contractor, who worked at the Agency's Foreign Service Institute as an Arabic Language and Culture Instructor. She filed an EEO complaint, alleging that (1) a male Arabic Language Training Supervisor sexually harassed her, and (2) similarly situated language instructors of other national origins were given more opportunities for trainings and text examinations, which in turn affected her performance evaluations and

ultimately diminished the likelihood of contract renewal. The Agency issued a final decision, finding no discrimination.

Upon review, the Commission found that the Agency improperly defined and fragmented the claims regarding trainings and text examinations. The seemingly different incidents were in reality part of the same claim: management's unlawful discriminatory failure to advance Complainant's career and contract renewal. The Commission found the record was missing comparative evidence showing the extent to which other similarly situated language instructors attended training and tested examinations, and an explanation for how such a disparity may negatively affect the Agency's evaluation of an instructor's performance and chances of contract renewal.

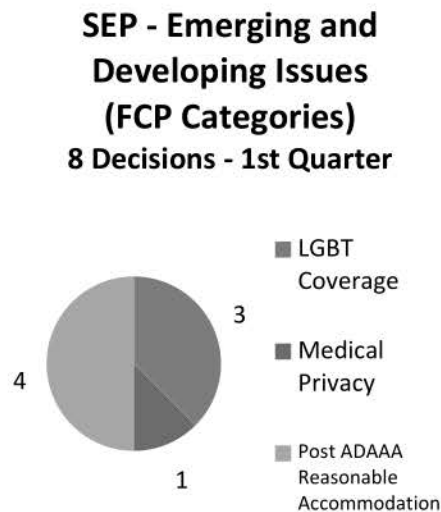
The Commission also found the record to be insufficiently developed to determine if the supervisor sexually harassed Complainant. The record was missing detailed sworn testimony from Complainant and the alleged harasser; evidence that other employees were sexually harassed by the same person; testimony from persons who observed Complainant's demeanor immediately after an alleged incident of harassment, as well as persons with whom she discussed the incident. Furthermore, the investigation failed to question these people about noticing changes in Complainant's behavior at work or in the alleged harasser's treatment of Complainant.

Finally, the Commission noted that Complainant appeared to have two complaints of discrimination that may be related. Complainant had filed another EEO complaint when the Agency did not renew her contract or select her for a full time teaching position. She alleged that those actions were discriminatory, and that her coworkers subjected her to hostile work environment based on her conversion to Christianity. The Commission vacated the Agency's final decision; remanded the complaint; and ordered the Agency to conduct a supplemental investigation and consolidate the two complaints, if the Agency was still processing the other complaint and had not yet issued a final decision.

The Agency filed a Request for Reconsideration. The Commission denied the Request, finding the Agency's request was not timely filed and ordered the Agency to conduct the supplemental investigation.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 1st Quarter of FY 2015 OFO resolved 8 decisions under this SEP Priority and its associated FCP priorities.



Decision Summaries for this Category

(b)(7)(C) **v. VA**, 0120110145 (10/23/2014) – This is a procedural decision, where the Agency dismissed Complainant's claim for failure to state a claim. Complainant alleged that the Agency subjected her to harassment and discrimination on the bases of sex (female), sex (sexual orientation) and reprisal for prior protected EEO activity when on January 29, 2010, the housekeeping supervisor told her he heard from members of the Design Development group that she was a "lesbian" and overheard comments that the Complainant hates men. He later asked the Complainant whether she was "married to a woman?" - to which the Complainant responded "just let it go;" and on February 5, 2010, Complainant requested that the Associate Director, protect her "privacy;" however on March 4, 2010, Complainant learned that the Site Manager, was asking employees in her work unit whether they had said that Complainant was a lesbian. Thereafter, Complainant requested that she be allowed to amend her complaint to include a claim that: she was subjected to harassment and a hostile work environment based on sex (female), sexual orientation, and reprisal (for the instant complaint) when she was subjected to 12 specific actions from October 2008 through May 26, 2010.

The Agency originally agreed to Complainant's request to amend her complaint but thereafter rescinded its approval, after finding that the claims in the amendment were not like or related to the original claims. The Agency also found that Complainant's claim based on her sexual orientation should be dismissed because this basis is not covered by Title VII. With regard to the remaining incidents of alleged harassment, the Agency found that they were not severe or pervasive enough to establish a hostile work environment. Therefore, the Agency dismissed the complaint.

Upon review, OFO, at the outset, found that The Agency erred by dismissing outright Complainant's claims of discrimination based on sexual orientation. OFO noted that the Commission has found that Title VII's sex discrimination provision, particularly the sex stereotyping theory, will offer protections to gay and lesbian individuals in certain circumstances. In this case, OFO found Complainant's claims were sufficient to state a sex discrimination claim under Title VII, because she alleged that the Agency discriminated against her because she failed to conform with the sex stereotypes of her fellow employees, namely that women who date women must hate men or that women who marry other women are not "normal."

Notwithstanding the above, however, OFO found that even considering the allegations contained in Complainant's May 2010 amendment request, the actions complained of, assuming that they are all true, were neither sufficiently severe nor pervasive enough to have created a discriminatory hostile or abusive working environment. OFO took into consideration the frequency of the alleged discriminatory conduct, its severity, whether it was physically threatening or humiliating as opposed to a mere offensive utterances, and whether the conduct interfered with the Complainant's work performance. OFO further found that the alleged activity was not reasonably likely to deter protected EEO activity, and that, with the exception of the original two allegations, the majority of these matters constituted simple workplace interactions which often include the expression of professional disagreements, different work styles, and personality conflicts.

(b)(7)(C) **v. DOT**, 0120142249 (10/14/2014) – Complainant worked at the Agency facility in Houston, Texas. On November 6, 2013, Complainant became aware that the Agency's Legal Division had requested, and obtained, a copy of his medical file from the Agency's Medical Division. On the same day, Complainant received a letter from the Agency's Medical Division Flight Surgeon requesting information about Complainant's personal health issues. Thereafter, he filed a complaint based on disability and reprisal.

The Agency dismissed the formal complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The Agency stated that Complainant, at the time, had two pending complaints before the Commission and that the Agency's Legal Division sought the medical file on "need-to-know" grounds. The Agency argued that it required the full medical file in order to prepare for the adjudicatory proceedings. The Agency found that its actions were appropriate under the circumstances.

We reversed the dismissal, concluding the complaint alleged a per se violation of the Rehabilitation Act's confidentiality requirements for medical records. We further determined that the Agency's explanation for the need for the medical records was not relevant to the procedural issue of whether Complainant has set forth an actionable claim. Rather, it constituted a premature decision on the merits of the claim before an investigation had occurred. The complaint was remanded to the Agency for further processing.

(b)(7)(C) **v. USPS**, 0520140236 (11/25/2014) – Complainant alleged that the Agency subjected her to discrimination on the basis of disability when, since November 2011, she was not permitted to work her existed modified job and on January 17, 2012, she received a notice that there was no work available. On July 18, 2012, the Agency issued a decision holding Complainant’s claim in abeyance pending outcome of a class complaint. In so holding, the Agency determined that the claim raised in Complainant’s complaint was identical to the claim raised in the complaint in (b)(7)(C) **v. U.S. Postal Service**, Agency Number 10-721-0008-12.

Complainant appealed the Agency’s decision. OFO vacated the decision and remanded the complaint for processing on the grounds that the Agency had failed to substantiate the basis for its final decision. We concluded that we could not determine whether the claim raised in Complainant’s complaint was identical to the claim raised in (b)(7)(C)

Complainant requested reconsideration, arguing that her claim was not identical to (b)(7)(C). OFO denied the request on the grounds that Complainant had made the argument before and, thus, did not meet the criteria for a grant of the request to reconsider. The Agency was again ordered to resume processing of Complainant’s individual complaint.

(b)(7)(C) **v. DOI**, 0520140376 (11/21/2014) – Complainant alleged, in pertinent part, that the Agency discriminated against her when it:

(1) denied her requests for advanced leave as a reasonable accommodation; and (2) suspended her for three days. The Agency issued a final decision finding no discrimination.

OFO, in its appellate decision, affirmed the Agency’s final decision. Regarding claim 1, OFO found that Complainant never provided the requested reasonable documentation about her disability and functional limitations. Regarding claim 2, OFO found that the Agency articulated a legitimate, nondiscriminatory reason for its actions; namely, Complainant did not follow her leave restriction and was charged AWOL on February 8, 2011. Moreover, OFO found that Complainant failed to prove that the Agency’s reason was pretextual.

OFO denied Complainant’s request for reconsideration. Regarding claim 1, Complainant argued that she submitted the requested documentation. OFO, however, found that the Agency was not required to provide Complainant with advanced leave as a reasonable accommodation. OFO noted that the Agency had approved Complainant’s leave requests for the use of accrued leave and LWOP. Regarding claim 2, Complainant argued that she was not AWOL on February 8, 2011 because the date was covered by a medical certification. OFO, however, found that the medical certification did not cover Complainant’s February 8, 2011 absence because it only confirmed that she was under a doctor’s care beginning on February 9, 2011.

(b)(7)(C) **v. USPS**, 0520140526 (11/06/2014) – Complainant filed an appeal with the Commission from the Final Action of the Agency which notified all potential class members of the (b)(7)(C) **v. U.S. Postal Service** class action that the class action had been settled by the parties. Complainant wished to appeal the benefits to be awarded to the class claimants, arguing that the settlement was insufficient. The initial appeal decision, EEOC Appeal No. 0120142376 (Aug. 19, 2014), dismissed Complainant’s appeal, finding that she did not have standing to file an appeal under 29 C.F.R. § 1614.204(g)(4), because she was not an objector to the proposed settlement when the Notice of Resolution was served on the class members.

Complainant filed a request for reconsideration in which she argued that she had not received the Notice of Resolution when it was served in November 2013, from which to file any objections to the proposed settlement. She also argued that the Agency had provided an incorrect address for OFO on its Final Action in April 2013, which thereby caused her initial appeal to appear to be untimely filed. The request for reconsideration decision denied Complainant’s request, finding that the Agency had provided documentation which showed that Complainant had been served with the Notice of Resolution at her address of record, providing her with the opportunity to make an objection to the proposed settlement. It affirmed the initial appeal decision dismissing Complainant’s appeal for lack of standing.

(b)(7)(C) **v. SSA**, 0720120034 (11/26/2014) – Complainant alleged, in pertinent part, that the Agency discriminated against her when: (1) it denied her request for an extension of her two-year Federal Career Internship Program (FCIP) appointment as a reasonable accommodation; and (2) it terminated her from her Claims Authorizer position instead of converting her to a career-conditional appointment. The AJ, after a hearing, found discrimination. The AJ ordered the Agency to, among other things, pay compensatory damages.

OFO affirmed the AJ's decision. First, OFO found that Complainant was "qualified" because she identified a reasonable accommodation (additional time for on-the-job training beyond the two-year FCIP period) that would allow her to perform the essential functions of the position (processing Social Security claims) and to meet the production standard associated with the position's essential functions (processing eight cases per day). OFO found that such an extension of time was not a lowering of the production standard but was instead an accommodation to enable Complainant to meet the production standard. Second, OFO found that the Agency failed to show that the requested accommodation would impose an undue hardship. Specifically, OFO determined that the Agency's generalized conclusions about the impact of the accommodation on other Claims Authorizers or Social Security applicants/beneficiaries were insufficient to show that the accommodation would cause significant difficulty or expense. Third, OFO found that the Agency was liable for compensatory damages because it failed to make a good faith effort to reasonably accommodate Complainant's disability. Specifically, OFO found that the Agency's decision not to grant the extension was not based on its good faith belief that EEOC policy guidance did not require such an extension. In addition, OFO found that the Agency did not seek an extension even though extensions of FCIP appointments were possible. Moreover, although the Agency had provided Complainant with other accommodations during her employment, OFO emphasized that the Agency's duty to provide reasonable accommodation was ongoing.

(b)(7)(C) **v USPS**, 0120132452 (11/18/2014) – During the period at issue, Complainant worked at an Agency facility in Atlanta Georgia. Complainant filed a formal complaint on the basis of sex (male), stating the he was subjected to a hostile work environment that included being subjected to numerous negative comments and innuendoes based on co-workers' perceptions that Complainant is gay. The Agency issued a final decision finding no discrimination, after Complainant did not request a hearing within the required time frame. The Agency found that the comments directed toward Complainant appeared to be directed toward his sexual orientation and were not covered under EEOC regulations, and that the conduct complained of was insufficiently pervasive or severe to rise to the level of a discriminatory hostile work environment.

On appeal, OFO found that the harassment claim, based on "perceived sexual orientation," is a claim of discrimination based on the perception that Complainant did not conform to gender stereotypes of masculinity, and thus stated a viable claim under Title VII's sex discrimination prohibition. Moreover, the Commission found that the record was insufficiently developed. Specifically, the Commission found that the record did not reflect an adequate effort during the investigation to determine whether various witnesses identified by Complainant could corroborate his claims; and that the complaint needed to be adjudicated within a larger context of ongoing harassment spanning several years, as reflected in an earlier harassment complaint previously remanded regarding similar harassment incidents.

The decision vacated the Agency's final decision, and remanded the formal complaint to the Agency for consolidation with the earlier complaint raising similar hostile work environment claims, and for the Agency to conduct a supplemental investigation to develop an adequate factual record.

(b)(7)(C) **v. CFPB**, 0120141108 (12/18/2014) – Complainant, an Examiner in Jacksonville, Florida, alleged the Agency subjected him to unlawful discrimination on the bases of reprisal, religion, sex, and sexual orientation when: (1) it investigated him for sexual harassment after employees complained about him sharing details about his same-sex relationship, and on another occasion, allegedly pointed to his crotch to convey the location of Jacksonville; (2) the Agency offered him a lower salary than other employees; (3) the Agency did not select him for internal positions; (4) the Agency did not assign him to particular projects; and (5) the Agency gave Complainant a "3" out of "5" on his annual performance evaluation.

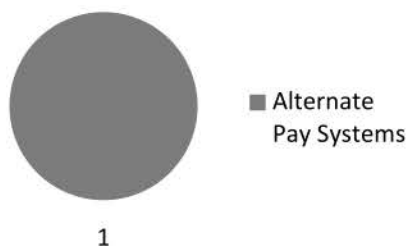
The Agency dismissed Complainant's sexual orientation claim on the basis that such claims could not be adjudicated in the EEO process. However, the Agency nonetheless investigated that claim through its internal process, which protects against sexual orientation discrimination. In its FAD on the remaining claims of reprisal, sex, and religious discrimination, the Agency found that its investigations of Complainant were necessary because it has an obligation to investigate and respond to any allegations of sexual harassment. The Agency noted that Complainant was not subjected to any adverse actions because of the investigations.

On appeal, the Commission found that the Agency incorrectly concluded that Complainant's claims could not be processed under EEO regulations. The Commission noted that Complainant claimed that he was treated differently because he did not conform to the sex stereotype that a man should not be romantically partnered with a man, or should not acknowledge he is gay to coworkers, and as such, his claims are akin to the claims in Veretto and Costello. The Commission reminded the Agency that lesbian, gay, and bisexual employees who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a complaint under the 1614 process because they may have experienced sex discrimination. Nevertheless, the Commission was able to address the merits of Complainant's sexual orientation claim because the record contained the investigation for this claim.

Regarding the merits of Complainant's claims, the Commission found that Complainant had not shown that the Agency's non-discriminatory explanations were pretext for unlawful disparate treatment, and likewise, Complainant failed to show that the Agency subjected him to unlawful harassment. However, the Commission noted that although agencies have a duty to promptly investigate and respond to claims of harassment, an agency should not conclude that an employee's conduct is inappropriate merely because the employee is gay, lesbian, or bisexual; the appropriateness or offensiveness of the conduct must be judged without regard to sexual orientation. The Commission held that if heterosexual employees may discuss their family lives and relationships in the workplace, gay employees must be allowed to do the same without being subjected to adverse actions or harassment. The Commission also stated that in order to prevent further conflict and unwarranted harassment allegations, the Agency should provide updated training to all employees and management on Title VII's prohibition of discrimination based on sexual orientation and gender stereotyping that is consistent with the Commission's current guidance, training materials, and current case law.

4. ENFORCING EQUAL PAY LAWS

SEP - Enforcing Equal Pay Laws (FCP Categories) 7 Decisions* - 1st Quarter



* Of the seven (7) cases that implicated this SEP priority, only one (1) implicated an FCP priority – Alternate Pay Systems

Decision Summaries for this Category

(b)(7)(C) **v. VA**, 0120130416 (10/08/2014) – Complainant was an older African-American woman, who worked as a Director at the Agency's Business Operations Division, GS-14 level. The Agency's other directors were younger, Caucasian and male. They were classified and paid at the GS-15 level. She claimed that she was subjected to harsher terms and conditions than others (outside of her protected groups) who held the same job title and performed similar functions, but were paid more. The Agency accepted the complaint. Complainant requested a hearing. The AJ issued a summary judgment decision, finding that the Agency articulated a legitimate reason for its delay in upgrading her position description or classification to reflect her duties. The Agency stated that it was awaiting approval of a reorganization plan. The record did not show the manner in which the other directors were granted GS-15 status. No discovery had been conducted when the AJ granted judgment in favor of the Agency. We reversed the entry of summary judgment, because we found that the record was incomplete and that the AJ did not draw justifiable inferences in Complainant's favor. We remanded the matter to the hearings unit, for a hearing before an AJ.

(b)(7)(C) **v USPS**, 0520130588 (10/07/2014) – We denied the Complainant's request for reconsideration. In our previous decision we modified an Agency's dismissal of Complainant's complaint. Specifically, we found that the Agency improperly dismissed Complainant's equal pay claim as untimely because under the Lily Ledbetter Fair Pay Act Complainant's claim was timely because she alleged pay discrimination within the 45 day filing period. We remanded this claim to the Agency for further processing. We also found that the Agency properly dismissed claim 2 because the alleged discriminatory act took place in 2005 and Complainant did not seek EEO Counseling until 2010, which is beyond the 45 day filing period.

In her request for reconsideration, Complainant requests reconsideration of only claim 2. After a review of the record we found that Complainant asserted the same arguments in her request for reconsideration that she asserted in her original appeal. Complainant failed to meet the criteria of 29 C.F.R. § 1614.405(c), and we denied her request for reconsideration. We reiterated our Order that the Agency is to process Complainant's Equal Pay Act claim in accordance with 29 CFR 1614.108.

(b)(7)(C) **v. VA**, 0520140223 (10/31/2014) – Complainant, a Physician at the Philadelphia, Pennsylvania Veterans Administration Medical Center, alleged that she was subjected to discrimination and harassment because of her sex (female), national origin (East Indian), age (over 40), race, and in retaliation for prior protected activity when: (1) in August 2008, she was detailed from her position as Chief of Pathology, subjected to an Administrative Board Investigation, and learned that she was being underpaid; and (2) she received a rating of less than satisfactory regarding one element of her annual performance in December 2008, and was reassigned permanently, from the position of Chief of Pathology to Staff Pathologist. In an appellate decision (EEOC Appeal No. 0120122481), the Commission affirmed an EEOC Administrative Judge's (AJ) summary judgment decision, which found that Complainant failed to prove that she was subjected to unlawful discrimination or harassment.

In her request for reconsideration, Complainant largely reiterated arguments raised before the AJ and on appeal. The Commission found that Complainant failed to meet the standard for granting the request for reconsideration, and therefore, upheld its appellate decision.

(b)(7)(C) **v. USDA**, 0120130396 (11/25/2014) – Complainant worked as a management and program analyst at the Information Solutions Organization in Salt Lake City, Utah. Complainant filed an EEO complaint alleging sex discrimination when was required to perform the duties of a GS-0343-12 management and program analyst, but was compensated at the GS-0343-11 level. At the conclusion of the investigation and after Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision finding no discrimination. On appeal, OFO noted that Complainant rejected an opportunity to have a desk audit of her position conducted. After review of the un-contradicted testimony of Complainant's supervisors, OFO concluded that the preponderance of the evidence did not establish that

Complainant had been performing the more complex analytical work required at the GS 12 level. For these reasons, OFO affirmed the Agency's final decision.

(b)(7)(C) **v. Army**, 0120141294 (11/19/2014) – Complainant worked as an attorney at the Agency's facility in Orlando, Florida. She filed a complaint alleging discrimination on the bases of sex (female) and age when, in September 2013, she was informed under the Agency's pay banding system that her pay was being effectively capped or frozen for the rest of her career. The Agency dismissed the formal complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1), reasoning that Complainant had not been moved out of her broad pay band, that she received the same amount of pay, and that she performed the same duties as she had performed before receiving the memorandum. Additionally, the Agency found the matter was a proposed action.

OFO reversed the dismissal for failure to state a claim. The decision found that Complainant was alleging that the Agency implementation of its pay-banding system as reflected in the September 2013 capping of her pay had a direct and present impact on her, noting she asserted "that women must hurdle to rise through the broadbands and ultimately into supervisory or management positions." OFO reversed the Agency's dismissal, and remanded the complaint to the Agency for investigation and further processing.

(b)(7)(C) **v. DOL**, 0120142374 (12/19/2014) – Complainant, a GS-14 Supervisory Mine Safety and Health Specialist, alleged that the Agency discriminated against her on the bases of sex, reprisal, and race when it refused to reclassify her position at the GS-15 level or pay her at the GS-15 level, in violation of Title VII and the Equal Pay Act (EPA).

After a hearing, the AJ found that the Agency provided legitimate, non-discriminatory reasons for its actions when it explained that, after a desk audit, Complainant's position was classified at the GS-14 level instead of the GS-15 level because it did not require supervision and oversight that involved exceptional coordination and integration of a number of important and complex program segments and programs; Complainant did not have signatory authority for establishing and implementing recommended policies; and Complainant did not manage work through subordinate supervisors. The AJ further found that Complainant failed to establish a violation of the EPA because she did not prove by a preponderance of the evidence that she received less pay than a male received for equal work, requiring skill, effort, and responsibility under similar working conditions within the same establishment. Additionally, the AJ found that any differential in pay was the result of classification standards; therefore, the differential was based on a factor other than sex. The Agency fully implemented the AJ's findings in a final order.

On appeal, the Commission determined that substantial evidence supported the AJ's finding and affirmed the Agency's final order.

(b)(7)(C) **v. DHS (TSA)**, 0120140351 (12/16/2014) – Complainant worked as a Transportation Security Inspector at the Agency's facility in Irvine, California. Complainant filed a complaint alleging that the Agency discriminated against her on the basis of sex (female) when Complainant became aware that she was not being paid a salary equal to male counterparts, even though she was performing the same duties as they were.

We determined that Complainant failed to establish a prima facie case of discrimination under the Equal Pay Act (EPA). We acknowledged that there were similarities in the work of Complainant and the comparator. However, we noted that their respective career tracks started off differently, which contributed to the differences in pay, and that their day-to-day functions differed as well. We determined that the weight of the evidence did not support Complainant's contention that she and the comparator performed equal work, requiring equal skill, effort and responsibility under similar working conditions. We affirmed the Agency's final decision finding of no discrimination.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

No significant cases to report under this priority during this quarter.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

(b)(7)(C) **v. State**, 0520140414 (12/11/2014) – **[Repeated under Priority 2 above]** – Complainant was a contractor, who worked at the Agency’s Foreign Service Institute as an Arabic Language and Culture Instructor. She filed an EEO complaint, alleging that (1) a male Arabic Language Training Supervisor sexually harassed her, and (2) similarly situated language instructors of other national origins were given more opportunities for trainings and text examinations, which in turn affected her performance evaluations and ultimately diminished the likelihood of contract renewal. The Agency issued a final decision, finding no discrimination.

Upon review, the Commission found that the Agency improperly defined and fragmented the claims regarding trainings and text examinations. The seemingly different incidents were in reality part of the same claim: management’s unlawful discriminatory failure to advance Complainant’s career and contract renewal. The Commission found the record was missing comparative evidence showing the extent to which other similarly situated language instructors attended training and tested examinations, and an explanation for how such a disparity may negatively affect the Agency’s evaluation of an instructor’s performance and chances of contract renewal.

The Commission also found the record to be insufficiently developed to determine if the supervisor sexually harassed Complainant. The record was missing detailed sworn testimony from Complainant and the alleged harasser; evidence that other employees were sexually harassed by the same person; testimony from persons who observed Complainant’s demeanor immediately after an alleged incident of harassment, as well as persons with whom she discussed the incident. Furthermore, the investigation failed to question these people about noticing changes in Complainant’s behavior at work or in the alleged harasser’s treatment of Complainant.

Finally, the Commission noted that Complainant appeared to have two complaints of discrimination that may be related. Complainant had filed another EEO complaint when the Agency did not renew her contract or select her for a full time teaching position. She alleged that those actions were discriminatory, and that her coworkers subjected her to hostile work environment based on her conversion to Christianity. The Commission vacated the Agency’s final decision; remanded the complaint; and ordered the Agency to conduct a supplemental investigation and consolidate the two complaints, if the Agency was still processing the other complaint and had not yet issued a final decision.

The Agency filed a Request for Reconsideration. The Commission denied the Request, finding the Agency’s request was not timely filed and ordered the Agency to conduct the supplemental investigation.

7. ENFORCEMENT – GENERAL

(b)(7)(C) **v. Army**, 0120120232 (10/24/2014) – Complainant worked as an Environmental Scientist at the Agency’s U.S. Corp of Army Engineers in Norfolk, Virginia. Complainant’s duties include delineating the extent of wetlands on property. Delineating wetlands is not an exact science and can be subjective. On several occasions, Complainant disagreed with other Environmental Scientists’ decisions about wetlands and threatened to report the disagreement to the Environmental Protection Agency, the Inspector General, or the U.S. Attorney. In addition, Complainant and his supervisor (S1) did not share the same philosophy regarding wetland delineation and had a tense relationship. Complainant filed a formal complaint alleging that the

Agency discriminated against him on the bases of religion (Protestant) and in reprisal for prior protected activity. At the conclusion of the investigation, Complainant requested a hearing, and after a hearing, the AJ found no evidence of any religious discrimination but that S1 had retaliated against Complainant when he took away Complainant's signature authority, he made comments to a coworker that it would be in her best interest not to work with Complainant, and his questioning of Complainant's co-workers and consultants about his performance. The AJ found that these actions would dissuade a reasonable person from engaging in the EEO process, and S1 had no legitimate, non-retaliatory reason for the conduct. Among other relief, the AJ awarded \$8,000.00 in non-pecuniary damages and 25% of the pecuniary damages he sought for increased chiropractic treatments and psychiatric visits. On appeal, Complainant contested both damage awards. In response, OFO increased the non pecuniary damage award to \$10,000 to keep it consistent with the amounts awarded in similar cases, but affirmed the AJ's decision in all other respects, noting that much of Complainant's medical treatment was related to other non-retaliatory events.

(b)(7)(C)

v. DOT, 0120122370 (10/24/2014) – Complainant worked as an Air Traffic Control Specialist in Detroit, Michigan. Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of sex/pregnancy when she was denied an award and, in explaining the denial, her supervisor said: “Just keep doing what you're doing and I'll see what I can do for you next year, unless you plan on taking maternity leave again. You don't have something you need to tell me, do you?” Complainant also alleged retaliation when she was not selected for a position, was accused of an operational deviation and when a front line Manager commented in front of the workers on Complainant's shift “Manning? Manning? You mean staffing”, then looked at Complainant and said “Holy cow, we almost had another EEO on our hands. At the conclusion of the investigation, Complainant requested a hearing, and after a hearing, the AJ found that Complainant had been subjected to sex/pregnancy discrimination. The AJ found that Complainant credibly testified that the Manager told her that “it would be pretty difficult to justify giving you anything when you were gone half the year on maternity leave, but keep doing what you are doing, and I will see what I can get you next year.” The AJ noted that the Manager further stated “What? You don't have something to tell me, do you? You are not pregnant now, are you?” The AJ reasoned that the Manager's statement was direct evidence of sex/pregnancy discrimination. However, the AJ further found that the same decision would have been made with regard to the award at issue even if the Manager had not considered Complainant's pregnancy or maternity leave. The AJ observed that the evidence established that Complainant was not a top performer and did not distinguish herself far above others. The AJ also found that the front line Manager made the EEO remark in retaliation for Complainant's prior protected activity. The AJ found no discrimination or retaliation with regard to the other claims. Among other relief, the AJ issued an award of non pecuniary damages in the amount of \$1,000.00. The AJ noted the paucity of evidence of the nature and severity of Complainant's pain and suffering due to the EEO remark, and the AJ rejected Complainant's request for \$170,000 in pecuniary damages for the expenses she incurred pursuant to relocating from Detroit to Denver, most of that amount reflecting the decrease in value of her Michigan home since when she purchased it. On appeal, Complainant contested both damage awards, but OFO affirmed the AJ's decision in its entirety, concluding that the AJ's findings of fact were supported by substantial evidence and her decision on damages was appropriate.

(b)(7)(C)

v. DOI, 0120131556 (10/9/2014) – Complainant filed an appeal contesting the denial of a remedy of reinstatement or front pay after a finding of discrimination by an EEOC AJ which was adopted by the Agency. Complainant alleged discrimination on the basis of disability (diabetes) and retaliation when he was subjected to a hostile work environment and was terminated during probation. Complainant was an Auditor. The AJ found that the Agency never provided Complainant with reasonable accommodations such as an ergonomic chair, an ergonomic keyboard, voice recognition software, and a flexible schedule. The AJ found that it could not be known whether Complainant was “right” for the position because Complainant was not provided accommodations. The AJ found discrimination on the bases of disability and retaliation. The AJ awarded relief, but did not order the Agency to reinstate Complainant or provide front pay. Complainant argued on appeal that he should be reinstated or given front pay. OFO found that reinstatement was an appropriate remedy. OFO noted that although the AJ found that Complainant's supervisors were hostile towards Complainant, Complainant had identified a different supervisor willing to provide Complainant with adequate training during his probationary period. OFO ordered reinstatement of Complainant in a different supervisory chain subject to

the remaining portion of his probationary period. OFO also ordered the Agency to consider disciplining the responsible management officials, and, as the AJ ordered, to provide EEO training to the responsible management officials. OFO restated the AJ's order to provide back pay, pay \$120,152 in compensatory damages, pay \$73,483 in attorney's fees, pay \$575 in costs to Complainant's attorney, pay \$376 in costs to Complainant, and post a notice of the finding of discrimination.

(b)(7)(C) **v. PBGC**, 0720130001 (10/9/2014) – The Agency filed an appeal from an EEOC administrative judge's (AJ) finding of race (African American) and color (black) discrimination regarding the denial of flexiplace on one day. Complainant, an Accountant, alleged she was discriminated against on the bases of race, color, and retaliation. After an investigation, the AJ issued summary judgment for the Agency regarding claims of harassing incidents and denial of flexiplace. The AJ held a hearing and found no discrimination on claims regarding different dates of denial of flexiplace. The AJ found race and color discrimination regarding the denial of flexiplace on one day as a sanction against the Agency. The AJ found that the Agency's representatives improperly obtained draft copies of the hearing transcript and used those draft copies to cross examine witnesses without providing Complainant with a copy of those draft transcripts. The Agency filed an appeal arguing that the imposition of sanctions and the award of \$1,000 in compensatory damages were improper. Complainant argues on appeal that the AJ improperly found that she was not discriminated against when she was denied permanent flexiplace. OFO found substantial evidence supported the AJ's finding of no discrimination. OFO found that the sanction was appropriate given the significant prejudicial effect of the Agency's actions. OFO further found that because Complainant established a prima facie case of race and color discrimination, this was sufficient to support relief by default judgment. OFO found that \$1,000 for nonpecuniary, compensatory damages due to the stress to Complainant was appropriate. OFO ordered the Agency to comply with the AJ's order to pay \$76 in pecuniary damages, to provide EEO training to the responsible management official, consider taking disciplinary action against the responsible management official, and to post a notice of the finding of discrimination.

(b)(7)(C) **v. BBG**, 0120110117 (Nov. 6, 2014) – Complainant filed an EEO complaint alleging that the Agency retaliated against her for engaging in prior protected EEO activity when she was subjected to the following events:

1. Around the last week of May or the early part of June 2009, an employee told Complainant that he had been ordered by a manager not to speak to her and that he was afraid of losing his job if he did.
2. On or about June 18, 2009, Complainant was told by the Director of Programs, in the presence of four other employees, that the Director and other employees had been instructed not to speak to Complainant.
3. On or about August 4, 2009, during a meeting with the management about the proposed Reduction-In-Force, Complainant was told that her job would be affected.
4. August 11, 2009, Complainant was told by a former employee that a management official told him that Complainant had "denounced" him to the Inspector General. Complainant asserted that this was false.
5. September 1, 2009, Complainant discovered that a memorandum written by the Program Director, attached to her current performance evaluation, included untrue and negative comments about her work performance.
6. September 17, 2009, Complainant was issued a letter of admonishment by her immediate supervisor (Supervisor). The letter indicated it was based on Complainant's conduct during a meeting with the Supervisor regarding her performance appraisal.

Despite requests by OFO for the complaint record, the Agency failed to provide it. A show cause order was issued on July 10, 2014. Again, the Agency failed to produce the records. As such, OFO issued this decision finding that, in this circumstance, the most appropriate sanction is default judgment for Complainant. After deciding to issue a default judgment for a complainant, OFO made a determination if there is evidence that establishes Complainant's right to relief. OFO noted that the FAD held that management was aware of

Complainant's EEO activity. OFO found that the Agency contends Complainant did not provide any evidence to support her other allegations; however the lack of a complaint file makes it impossible to determine whether there is support for the Agency's contention. Therefore, OFO had to assume that Complainant's allegations are true. Therefore, Complainant was entitled to remedies based on the default judgment against the Agency. As remedy, OFO ordered the Agency to calculate compensatory damages and remove the September 17, 2009 letter of admonishment.

(b)(7)(C) **v. SSA**, 0720120034 (Nov. 26, 2014) – Complainant alleged, in pertinent part, that the Agency discriminated against her when: (1) it denied her request for an extension of her two-year Federal Career Internship Program (FCIP) appointment as a reasonable accommodation; and (2) it terminated her from her Claims Authorizer position instead of converting her to a career-conditional appointment. The AJ, after a hearing, found discrimination. The AJ ordered the Agency to, among other things, pay compensatory damages.

OFO affirmed the AJ's decision. First, OFO found that Complainant was "qualified" because she identified a reasonable accommodation (additional time for on-the-job training beyond the two-year FCIP period) that would allow her to perform the essential functions of the position (processing Social Security claims) and to meet the production standard associated with the position's essential functions (processing eight cases per day). OFO found that such an extension of time was not a lowering of the production standard but was instead an accommodation to enable Complainant to meet the production standard. Second, OFO found that the Agency failed to show that the requested accommodation would impose an undue hardship. Specifically, OFO determined that the Agency's generalized conclusions about the impact of the accommodation on other Claims Authorizers or Social Security applicants/beneficiaries were insufficient to show that the accommodation would cause significant difficulty or expense. Third, OFO found that the Agency was liable for compensatory damages because it failed to make a good faith effort to reasonably accommodate Complainant's disability. Specifically, OFO found that the Agency's decision not to grant the extension was not based on its good faith belief that EEOC policy guidance did not require such an extension. In addition, OFO found that the Agency did not seek an extension even though extensions of FCIP appointments were possible. Moreover, although the Agency had provided Complainant with other accommodations during her employment, OFO emphasized that the Agency's duty to provide reasonable accommodation was ongoing.

(b)(7)(C) **v. USPS**, 0120122965 (Nov. 13, 2014) – An EEOC AJ found discrimination and awarded Complainant relief, including back pay and restoration of annual leave and sick leave. Under 29 C.F.R. 1614.504, Complainant appealed, alleging that the Agency failed to comply with the terms of the final action. Specifically, she argued that the Agency did not (1) pay her at least \$2,500 for a STEP increase she would have earned absent the discrimination; (2) compensate her for 7 months of interest she lost for having to prematurely withdraw from her retirement funds; (3) restore the proper amount of leave used, or pay her for this leave upon her retirement; (4) pay attorney's fees.

Upon review, the Commission first remanded the issue of whether Complainant was entitled to an annual performance bonus of \$2,500.00 to the Agency to request additional information and documentation from Complainant.

Second, the Commission found that the Agency complied with the AJ's decision when it did not compensate her for 7 months of lost interest from her retirement funds because the AJ's decision did not provide any specific award for damages relating to Complainant's retirement funds.

Third, the Commission found that the Agency complied with the AJ's decision and final order when it restored to Complainant 1096 hours of sick leave and 192 hours of annual leave. However, the Commission further directed the Agency to notify the U.S. Office of Personnel Management (OPM) of Complainant's restored 1096 hours of sick leave, so that OPM could recalculate Complainant's service credit and retirement benefits.

Fourth, the Commission declined to award attorney's fees at this stage of the administrative process because (1) the AJ did not award Complainant attorney's fees in the processing of the underlying complaint, and (2) Complainant has not yet shown she is the prevailing party on appeal.

(b)(7)(C) **v. EPA**, 0120131489 (12/12/2014) – Complainant filed an appeal contesting the denial of a remedy of compensatory damages after a finding of discrimination by the agency. The agency found complainant was discriminated against on the basis of reprisal when her 120-day detail was terminated. The agency instructed complainant she had 45 days to submit evidence in support of her claim for compensatory damages. Complainant submitted no evidence in support of her request for compensatory damages and the agency issued a decision on the remedies denying any compensatory damage award. OFO agreed with the denial of any award of compensatory damages because complainant failed to timely submit evidence in support of such an award. OFO ordered the agency to provide complainant with the opportunity for a 120-day detail, conduct EEO training and consider disciplining responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. DOE**, 0720130030 (12/12/2014) – Complainant, a member of the Senior Executive Service, worked as a Director at the Agency's Savannah River Site (SRS). Complainant alleged that he was subjected to discrimination when an Agency employee discussed him in defamatory e-mails and newspaper articles hurting his career and reputation. Specifically, Complainant alleged that local publications and national newspapers articles mentioned him and his minority coworkers, with one article stating that he and his coworkers had "agendas of greed and power." Complainant also indicated that his photo was on the front page of a newspaper with the headline, "Unprofessional Behavior Plagues SRS." Complainant contended that anonymous e-mails were sent from a person going by the alias "Fraud Buster" (FB) targeting both him and another Director (African-American, female). Therein, FB accused the female Director of misappropriating \$9 million in funding, alleging the money was given to a Historically Black University. The FB also implicated Complainant, writing that he was responsible for the hiring of minority employees, and requested that both the female Director and Complainant be removed from their positions. As a result of the newspaper articles and FB's accusations, the Agency's Inspector General (IG) conducted an investigation against Complainant and the female Director. The IG however found no evidence to substantiate the allegations made against Complainant and the female Director. Instead, the IG raised concerns about racism and discrimination within the Agency.

After an investigation and hearing, the AJ assigned to the case found that that Complainant established that the Agency was motivated by discriminatory animus based on his race. In particular, the AJ found that the Agency took absolutely no action to prevent, deter, or advise employees on the improper leaks to the media. In finding that Complainant had been subjected to disparate treatment, the AJ noted that a Caucasian comparator expressed concern to management that the details of his meetings and work had been relayed to a publication. The AJ noted, however, that unlike in Complainant's case, the Agency immediately took action on the comparator's behalf and management thwarted any further information from being leaked about the comparator. The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged. On appeal, we analyzed the matter as a hostile work environment case instead of under disparate treatment theory, finding substantial evidence in the record to support the AJ's finding of discrimination. Therein, we found that it was well known that a supervisor with the Agency was the FB responsible for leaks and e-mails, and that FB's actions were based on Complainant's protected status as an African-American. We found that the supervisor's actions as FB were severe and pervasive enough to constitute harassment. We pointed out that other employees testified that the SRS had a history of subjecting African-American employees to extreme bigotry, including highly charged racial epithets (the n-word) and highly charged derogatory symbols of discrimination.

(b)(7)(C) **v. USPS**, 0720140002 (12/12/2014) – The Agency filed an appeal from an EEOC AJ's finding of sexual (female) harassment. Complainant, among other claims, alleged she was harassed when a coworker called her a "bitch", hit a table, and told complainant she "was not safe off the clock". Management arranged a meeting between Complainant and the coworker, but the coworker denied making the threat and further argued that Complainant should have been escorted from the building. After a hearing, the AJ found that the Agency created a hostile work environment on the basis of sex and further

improperly denied a reasonable accommodation to Complainant. The Agency only appealed the finding of sexual harassment. Complainant appealed the award of \$35,000 in nonpecuniary, compensatory damages. OFO found substantial evidence supported the AJ's finding of sexual harassment and OFO noted that the Agency failed to take immediate and appropriate corrective action. OFO agreed with the AJ that \$35,000 for nonpecuniary, compensatory damages due to Complainant's emotional distress was appropriate. OFO ordered the Agency to comply with the AJ's order to pay \$1,368 in pecuniary damages, to pay \$35,000 in nonpecuniary, compensatory damages, to provide EEO training to the office, to consider taking disciplinary action against the responsible management officials, and to post a notice of the finding of discrimination.

III. Federal Sector Oversight

- During the 1st quarter of FY 2014, OFO issued a feedback letter to one federal agency that participated in the FCP program evaluation. The feedback letter included a fact sheet describing the process for converting Schedule A hires to the competitive service.
- During the 1st quarter of FY 2015, OFO collected and reviewed FY 2014 Form 462 reports from 308 agencies and sub-components. OFO staff provided feedback to most agencies to assist with data accuracy and completeness.
- During the 1st quarter of FY 2015, OFO continued to monitor the progress of the Social Security Administration's (SSA) efforts to comply with the program evaluation report issued in FY 2014.
- OFO in collaboration with OIT continues to generate and quality check the statistical tables for the FY 2013 and FY 2014 Form 462 Reports it collected from 310 federal agencies and sub-components (utilizing the new collection tool through the Federal Sector portal) for publication.
- OFO continues to discuss the comments on MD-110 received from stakeholders and the public, as clarifications are drafted and incorporated into the Management Directive.
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees. (Sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees.)

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- FSP Director presented on disability panel "Trends and Updates in Federal Sector Disability Employment" teleconference for Helix Opportunity.
- FSP Director presented on panel discussion "Promoting and Advancing the Employment of Persons with Disabilities in the Federal Workplace" for Federal Communications Commission in Washington, DC.
- TOD staff presented "Reasonable Accommodation" for Managers webinar for U.S. Citizenship and Immigration Services.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- TOD Director presented “Diversity Best Practices?” Federal Interagency Diversity Partnership meeting for U.S. Food and Drug Administration in Washington, DC.

3. Addressing Emerging and Developing Issues

- OFO staff conducted teleconference for Army and Office of Personnel Management on “EEOC Cases Issued regarding Transgender Issues, Emerging Transgender Issues.”
- EEOC staff gave a presentation on “LGBT and Changes in the Law” for the Navy in Southbridge, MA.
- EEOC staff conducted LGBT training for U.S. Office of Special Counsel in Washington, DC.
- OFO staff conducted “LGBT Issues” webinar for EEO staff for Internal Revenue Service.

4. Enforcing Equal Pay Laws

- OFO has no outreach/training activities regarding this priority to report.

5. Preserving Access to the Legal System

- EEOC staff presented “Preserving Access to the Legal System - Procedural Dismissal Report/Common Error by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds” for Broadcasting Board of Governors in Washington, DC.
- TOD staff conducted EEO Laws and EEO Process training for U.S. Department of State in Arlington, VA.
- OFO staff presented DEEP Lawyers Group Series “Class Complaints & EEOC Appeals Process” for at Department of Transportation in Washington, DC.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- EEOC staff conducted Retaliation training for USDA, Fish and Wildlife in Falls Church, VA.
- TOD staff conducted Anti-Harassment - Senior Managers for U.S. Environmental Protection Agency in Washington, DC.
- TOD staff conducted two (2) Manager Refresher – Process and Retaliation trainings for Financial Crimes Enforcement Network in Washington, DC and Vienna, VA.

7. Training/Outreach – General

- TOD conducted national New Counselor course in Washington, DC.
- TOD conducted national New Investigator and Investigator Refresher course in Washington, DC.
- TOD conducted national Barrier Analysis course in Washington, DC.

- TOD conducted national MD-715 course in Washington, DC.
- OFO staff conducted MD-715 training for Air Force at LA AFB in Los Angeles, CA.
- OFO staff conducted Barrier Analysis training for Air Force at LA AFB in Los Angeles, CA.
- TOD Director and OFO staff presented Barrier Analysis training for USDA Food Safety and Inspection Service in Beltsville, MD.
- TOD staff conducted 2-Day Manager training for Consumer Financial Protection Bureau in Washington, DC.
- OFO staff conducted ½ -Day MD-715 for Managers for Navy in Millington, TN.
- EEOC and OFO staff conducted four (4) 2-Day Manager training for Consumer Financial Protection Bureau in Chicago, IL.
- TOD staff conducted 2-Day Manager for Consumer Financial Protection Bureau in Washington, DC.
- TOD staff provided training materials to Social Security Administration in Baltimore, MD.

8. Technical Assistance Visits

- FSP staff conducted TA visits with the following agencies (FCP denotes TA visit on the Federal Sector Complement Plan):
 - VA National Cemetery Administration (11-16-14)
 - DOT Federal Highway Admin (11-18-14)
 - VA Veterans Health Administration (11-20-14)
 - VA Veterans Benefits Administration (11-21-14)
 - USDA Agricultural Research Service (11-24-14)
 - DOE Bonneville Power Admin (12-2-14)
 - National Gallery of Art (12-3-14)
 - Smithsonian Institution (12-4-14)
 - DHS Transportation Security Administration (12-9-14)
 - DOJ Drug Enforcement Admin (12-9-14)
 - DOE National Nuclear Security Administration (12-10-14)
 - DTR Departmental Offices (12-10-14)
 - DTR U.S. Mint (12-10-14)
 - DHS United States Coast Guard (12-11-14)
 - USDA Animal and Plant Health Inspection Service (12-11-14)
 - DHS Customs and Border Protection (12-12-14)
 - DOJ Bureau of Prisons (12-15-14)
 - USDA Farm Service Agency (12-17-14)
 - HHS Office of the Secretary (12-18-14)
 - DOD Defense Media Activity (12-18-14)